

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

LISA PELHAM; ASHLY PELHAM;
MIRANDA PELHAM,

No. 3:13-cv-01233-HU

Plaintiffs,

**FINDINGS AND
RECOMMENDATION**

v.

UNITED STATES OF AMERICA,
Defendant.

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1 HUBEL, Magistrate Judge:

2 Acting through its insureds, Lisa Pelham and her two children,
3 Ashly and Miranda Pelham (collectively "the Pelhams"), USAA
4 Insurance Company ("USAA") brought this subrogation action against
5 the United States of America ("the Government") under the Federal
6 Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, seeking,
7 among other things, to recover \$3,681.60 in personal injury
8 protection ("PIP") benefits it paid to the Pelhams as a result of
9 a collision with a United States Postal Service ("USPS") truck in
10 the summer of 2010. The Government now moves, pursuant to Federal
11 Rule of Civil Procedure ("Rule") 12(b)(1), to dismiss the Pelhams'
12 complaint for lack of subject matter jurisdiction.

13 Enacted in 1946, the FTCA waives the Government's sovereign
14 immunity with respect to tortious conduct of federal employees,
15 subject to certain enumerated exceptions. *See Levin v. United*
16 *States*, 133 S. Ct. 1224, 1227-28 (2013); *Garcia-Catalan v. United*
17 *States*, 734 F.3d 100, 102 (1st Cir. 2013). The Government argues
18 that the present action is not permitted by the FTCA's limited
19 waiver of sovereign immunity because the Pelhams accepted
20 administrative settlements in late October 2013. *See* 28 U.S.C. §
21 2672 (granting agencies authority to settle claims "under
22 circumstances where the United States, if a private person, would
23 be liable to the claimant in accordance with [state law]," and
24 noting that "[a]cceptance by the claimant of any such award,
25 compromise, or settlement shall be final and conclusive . . . and
26 shall constitute a complete release of any claim against the United
27 States").

1 When confronted with a scenario closely resembling the
2 situation presented here, Judge Simon granted the Government's
3 motion to dismiss the insured's complaint for lack of subject
4 matter jurisdiction. See *Stevens v. United States*, No.
5 3:11-cv-01207-SI, 2012 WL 1314187, at *4 (D. Or. Apr. 17, 2012)
6 ("[B]ecause [the insurer] is suing in [the insured]'s name, it has
7 no recourse: [the insured] may not bring further claims against the
8 United States [in light of the settlement under § 2672]. This
9 court is, therefore, without jurisdiction"). As discussed further
10 below, the Court agrees with Judge Simon's reasoning in *Stevens*
11 and, therefore, recommends that the Government's motion (Docket No.
12 11) to dismiss be granted.

13 I. FACTS AND PROCEDURAL HISTORY

14 On August 24, 2010, while driving near the interchange of
15 Interstate 405 and United States Highway 26 in Portland, Oregon,
16 the Pelhams were injured when a USPS employee driving a postal
17 service truck collided with their vehicle. (First Am. Compl. ¶¶ 2-
18 3; Taylor Decl. Ex. 1 at 1.) Lisa Pelham was driving a 1997
19 Chrysler Town and Country minivan, which she owned, and her two
20 daughters were passengers. (First Am. Compl. ¶ 2.) It is alleged
21 that the USPS employee negligently failed to maintain a proper
22 lookout for other vehicles, failed to maintain proper control over
23 the postal service truck, operated the postal service truck at an
24 unreasonable speed, and followed too closely behind Lisa Pelham's
25 minivan. (First Am. Compl. ¶ 4.)

26 Because the accident occurred while the USPS employee was
27 driving a government-owned vehicle in the course and scope of his
28 or her employment (First Am. Compl. ¶¶ 2-3), the USPS employee's

1 allegedly negligent conduct is imputed to the Government and the
 2 USPS, *see Young v. United States*, 71 F.3d 1238, 1241 (6th Cir.
 3 1995). The Government would therefore bear all liability for the
 4 USPS employee's alleged negligence. *See id.*

5 As a result of the accident, Ashly and Miranda Pelham suffered
 6 injuries to their necks and back, and Lisa Pelham suffered injuries
 7 to her neck, back, elbow, forearm, and shoulder. (First Am. Compl.
 8 ¶¶ 5-7.) Pursuant to Oregon's no-fault statute and its own policy,
 9 USAA paid basic PIP benefits of \$3,681.60 to the Pelhams for
 10 medical expenses incurred as a result of the accident on August 24,
 11 2010.¹ *See generally State Farm Mut. Auto. Ins. Co. v. Hale*, 215
 12 Or. App 19, 24 (2007); OR. REV. STAT. § 742.520.

13 Sometime thereafter, USAA, as the Pelhams' subrogee, filed an
 14 administrative claim with the USPS in an attempt to recover the PIP
 15 benefits it paid to the Pelhams. (Gore Decl. ¶¶ 4-6.) By letter
 16 dated August 13, 2012, the USPS rejected the administrative claim
 17 and informed USAA that it had six months to file a lawsuit in
 18 federal district court or, alternatively, to file a written request
 19 for reconsideration with the postal official who issued the final
 20 denial of the claim.² (Gore Decl. Ex. 1 at 1-2.) Ten days later,
 21

22 ¹ Lisa Pelham is a resident of Washington County, Oregon.
 23 (Civil Cover Sheet at 1; Gore Decl. Ex. 2 at 1.) "At all material
 24 times, USAA . . . provided personal injury protection coverage
 25 under a policy of motor vehicle liability insurance to [the
 26 Pelhams]. USAA paid personal injury protection benefits . . . in
 the amount of \$3,681.60 for [the Pelhams]' reasonable and necessary
 medical expenses." (Gore Decl. ¶¶ 2-3; *see also* First Am. Compl.
 ¶¶ 5-7; Gore Decl. Ex. 2 at 1.)

27 ² The August 13, 2012 letter sent by the USPS refers to the
 28 claimant as Saleshe Mishra and indicates that USAA sought to recover
 \$4,125.23 in PIP benefits. (Gore Decl. Ex. 1 at 1.) The original
 complaint in this case, filed on July 22, 2013, sought to recover

1 acting through the Pelhams and Mickey Mishra, USAA filed an FTCA
 2 action against the Government in the United States District Court
 3 for the District of Oregon, and the case was assigned to Judge
 4 Simon.³ (Gore Decl. ¶ 8.)

5 On October 26, 2012, after receiving assurances from the
 6 Government regarding a potential statute of limitations defense,
 7 USAA filed a stipulated motion to dismiss the FTCA action without
 8 prejudice. (Gore Decl. ¶¶ 9-11.) Judge Simon signed and entered
 9 the stipulated general judgment of dismissal without prejudice
 10 three days later, on October 29, 2012. See FED. R. CIV. P.
 11 41(a)(1)(A)(ii) (explaining that the plaintiff may dismiss an
 12 action without a court order by filing a stipulation of dismissal
 13 signed by all parties who have appeared).

14 According to USAA's counsel, the Government requested that the
 15 FTCA action be dismissed because it had not formally accepted or
 16 denied USAA's administrative claim. (Gore Decl. ¶ 9.) It's not
 17 clear whether USAA amended its claim or filed a request for
 18 reconsideration on August 23, 2012—the same day the original FTCA
 19 action was filed and one day prior to the two-year anniversary of
 20

21 \$4,125.23 in accident-related PIP benefits, including \$443.61 paid
 22 by USAA on behalf of a passenger in Lisa Pelham's vehicle by the
 23 name of Mickey Mishra. (Compl. ¶¶ 2-3, 5-8.) When USAA filed an
 24 amended complaint on December 16, 2013, Mickey Mishra was no longer
 a named plaintiff and USAA no longer sought the \$443.61 in benefits
 it paid on her behalf. (First Am. Compl. ¶¶ 2-3, 5-7.)

25 ³ The Court takes notice of filings from the case assigned to
 26 Judge Simon, even though the parties have not specifically asked
 27 the Court do so. See *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*,
 442 F.3d 741, 746 n.6 (9th Cir. 2006) (holding that judicial notice
 28 of court filings and other matters of public record is proper);
 FED. R. EVID. 201(c)(2) (explaining that a court may take judicial
 notice on its own).

the Pelhams' accident—either of which would seem to explain why the Government said it had until February 23, 2013 to accept or deny the administrative claim.⁴ See 28 U.S.C. § 2675(a) (administrative exhaustion requirement permitting claimants to file suit at their option at "any time" if six months have passed without final agency action on a claim); 39 C.F.R. § 912.9(b) (explaining that the agency has six months to consider a request for reconsideration and the claimant's options under § 2675(a) will not accrue until six months after the filing of the request); 28 C.F.R. § 14.2(c) (stating the same as § 921.9(b) with respect to amendments to an administrative claim).

After not receiving any response from the Government at any time prior to February 23, 2013, USAA re-filed its FTCA complaint on July 22, 2013, and the case was assigned to this Court. Several months later, on October 21, 2013, USAA's counsel filed an unopposed motion to stay the proceedings for a period of four months, upon being notified that Lisa Pelham was "filing, or ha[d] filed, her own [administrative claim] with [the USPS]." (Pls.' Unopposed Mot. Stay at 2.) Oregon law required that Lisa Pelham provide such notice to USAA. See OR. REV. STAT. § 742.536(1) ("When a liability insurer has furnished [PIP] benefits . . . for a person injured in a motor vehicle accident, if such injured person makes

⁴ Section 2401(b) "sets a two-year deadline within which a claimant must present his claim 'to the appropriate Federal agency . . . after such claim accrues.'" *Kwai v. Fun Wong v. Beebe*, 732 F.3d 1030, 1033 (9th Cir. 2013) (citation omitted). Section 2401(b) "also establishes a second limitations period—that '[a] tort claim against the United States shall be forever barred unless action is begun within six months after the final denial of the claim by the agency to which it was presented.'" *Id.* (citation and ellipses omitted)

1 claim, or institutes legal action, for damages for such injuries
2 against any person, such injured person shall give notice of such
3 claim or legal action to the insurer").

4 Four days later, on October 25, 2013, Lisa Pelham signed
5 separate written § 2672 settlement agreements on behalf of herself
6 and her two minor children, Ashly and Miranda Pelham. (Taylor
7 Decl. ¶ 3, Ex. 1 at 1-14.) The Pelhams received a combined total
8 of \$20,000 in exchange for releasing any and all accident-related
9 claims against the Government. (Taylor Decl. Ex. 1 at 1, 5, 10.)
10 On December 4, 2013, the Court denied USAA's unopposed motion to
11 stay proceedings during a telephone status conference. Twelve days
12 later, USAA filed its amended complaint excluding any reference to
13 Mickey Mishra and the PIP benefits paid on her behalf. The
14 Government's Rule 12(b)(1) motion to dismiss for lack of subject
15 matter jurisdiction followed shortly thereafter on January 9, 2014.

16 II. LEGAL STANDARD

17 "A Rule 12(b)(1) jurisdictional challenge may be facial or
18 factual." *Pride v. Correa*, 719 F.3d 1130, 1133 n.6 (9th Cir.
19 2013). The jurisdictional challenge is factual where the moving
20 party "relie[s] on extrinsic evidence and d[oe] not assert [a]
21 lack of subject matter jurisdiction solely on the basis of the
22 pleadings." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039
23 (9th Cir. 2004) (quoting *Morrison v. Amway Corp.*, 323 F.3d 920, 924
24 n.5 (11th Cir. 2003)).

25 In resolving a factual challenge on jurisdiction, "the
26 district court may review evidence beyond the complaint without
27 converting the motion to dismiss into a motion for summary
28 judgment." *Id.* The district court need not presume the

1 truthfulness of the plaintiff's allegations. *Id.* "Once the moving
 2 party has converted the motion to dismiss into a factual motion by
 3 presenting affidavits or other evidence properly brought before the
 4 court, the party opposing the motion must furnish affidavits or
 5 other evidence necessary to satisfy its burden of establishing
 6 subject matter jurisdiction." *Id.* (quoting *Savage v. Glendale*
 7 *Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003)).

8 **III. DISCUSSION**

9 **A. Extrinsic Evidence**

10 The Government relies on extrinsic evidence and correctly
 11 notes that its making a factual challenge on jurisdiction. At one
 12 point in its response brief, USAA disputes whether the Court may
 13 consider extrinsic evidence at this stage in the proceedings,
 14 arguing that the Government is using a Rule 12(b)(1) jurisdictional
 15 challenge as a backdoor motion for summary judgment. USAA's
 16 argument is belied by the case law. *See, e.g., Stevens*, 2012 WL
 17 1314187, at *1-2 (considering extrinsic evidence in the same
 18 context). It is also belied by the facts that USAA has furnished
 19 its own extrinsic evidence and cites *Roberts v. Corothers*, 812 F.2d
 20 1173, 1177 (9th Cir. 1987), for the proposition that, "[w]here the
 21 attack is factual, the court may consider evidence presented on the
 22 jurisdictional issue and resolve factual disputes, if necessary."
 23 (Resp. Mot. Dismiss at 3-4.) The Government is making a factual
 24 challenge on jurisdiction and the extrinsic evidence submitted by
 25 both parties will be considered by the Court.

26 **B. Subject Matter Jurisdiction**

27 There is no dispute in this case that the Pelhams accepted
 28 settlements from the Government for their injuries resulting from

1 the accident on August 24, 2010. Such an acceptance is considered
2 "final and conclusive" and "constitute[s] a complete release of any
3 claim against the United States and against the employee of the
4 government whose act or omission gave rise to the claim." 28
5 U.S.C. § 2672; see also *Stevens*, 2012 WL 1314187, at *2 ("claimant
6 who accepted a check from United States 'may not now pursue the
7 claim in court under the FTCA'" (citing *Clark v. United States*, 978
8 F.2d 1265 (9th Cir. 1992) (unpublished))).

9 USAA nevertheless attempts to bring this subrogation action
10 under the FTCA in the named of its insureds, relying on Oregon law.
11 See generally *Wanjala v. United States*, No. 10-486-AC, 2011 WL
12 4498826, at *4 (D. Or. July 22, 2011) ("In order for the [district]
13 court to have subject matter jurisdiction, the United States must
14 be analogized to a tortfeasor governed by the laws of Oregon").
15 There are three methods for recouping PIP benefits under Oregon
16 law, only two of which are relevant here.⁵ See *Stevens*, 2012 WL
17 1314187, at *3 (making an analogous observation).

18 When the insured makes claim or institutes legal action for
19 damages against the tortfeasor, ORS 742.536 allows the insurer to
20 attach a lien to any recovery by the insured for the amount of PIP
21 benefits provided, as long as the insurer has not sought
22 reimbursement under ORS 742.534, the interinsurer reimbursement
23 statute. See *Wanjala*, 2011 WL 4498826, at *4; see also *Stevens*,
24

25 ⁵ Under ORS 742.534, every authorized motor vehicle liability
26 insurance provider whose insured is or could potentially be held
27 liable for injuries to another party is required to reimburse the
28 injured party's insurer for PIP benefits paid by that insurer to
the injured person. Because the Government is not an insurer
entitled to seek direct or interinsurer reimbursement, this
provision is not applicable.

1 2012 WL 1314187, at *3 (noting that ORS 742.536 is known as the
2 "PIP lien statute"). When the insurer elects not to follow the
3 procedure in the PIP lien statute, ORS 742.538 allows the insurer
4 to bring an action in the name of its insured to recover the PIP
5 benefits furnished. See OR. REV. STAT. § 742.538(4); see also
6 *Stevens*, 2012 WL 1314187, at *3 (noting that ORS 742.538(4) is
7 known as the PIP subrogation statute).

8 As in *Stevens*, USAA's counsel elected to follow the PIP
9 subrogation statute and seek reimbursement for the PIP benefits
10 paid by asserting a claim against the Governments in the Pelhams'
11 name. In rejecting virtually the same arguments as those offered
12 by USAA's counsel in this case, Judge Simon stated:

13 [T]he effect, scope, and limits of a settlement made
14 pursuant to 28 U.S.C. § 2672 is a matter of federal law
15 with respect to the settling party. . . . After examining
16 the text of 28 U.S.C. § 2672, the Ninth Circuit [once] held that as a matter of federal law . . . an
17 administrative settlement reached pursuant to [28 U.S.C.
18 §] 2672 bars further claims by the settling party, without regard to the effect it would have as a matter of state law. . . . [F]ederal law [therefore] controls the legal effect of a settlement on the settling party, regardless of state law.

19 In the present case, under 28 U.S.C. § 2672, Ms.
20 Stevens' settlement with the United States foreclosed all
21 future claims in her name, regardless of Oregon law. As
22 such, it does not matter that, under the PIP subrogation
23 statute and Oregon subrogation case law, a settlement
24 ordinarily might not extinguish a subrogee insurer's
25 right to recover from the tortfeasor. [The Ninth Circuit
26 has held] that 28 U.S.C. § 2672 overrides Oregon law and
27 prohibits further action in Ms. Stevens' name. . . . Had
28 State Farm brought this action in its own name, . . . the
court would look to state law to determine the effect,
scope, and limits of Ms. Stevens' settlement. In the
present posture, however, because State Farm is suing in
Ms. Stevens' name, it has no recourse: Ms. Stevens' may
not bring further claims against the United States. This
court is, therefore, without jurisdiction.

1 *Id.* at *4 (internal citations, quotation marks, brackets and
2 footnote omitted).

3 The Court has been presented with no arguments that lead it to
4 question the legal soundness of Judge Simon's decision in *Stevens*.
5 While Judge Simon felt it was a "harsh result" for the insurer—who
6 was represented by USAA's counsel—he also took the time to note
7 that the insurer was "not without options," and in future cases,
8 could "use the PIP lien statute to recover PIP benefits payments
9 made to its insureds after accidents in which the United States is
10 the tortfeasor." *Id.* at n.7. The unopposed motion to stay
11 proceedings, filed on October 21, 2013, indicated that USAA's
12 counsel had been notified that Lisa Pelham was "filing, or ha[d]
13 filed, her own [administrative claim] with [the USPS]," and that
14 USAA's counsel was "exploring" the alternative option of filing a
15 lien.

16 It seems clear, then, that USAA at least had the option of
17 electing to seek reimbursement out of the Pelhams' recovery by
18 serving written notice to the insureds and the tortfeasor within
19 thirty days "from the receipt of *notice* or knowledge of *such claim*
20 or legal action." OR. REV. STAT. § 742.536(2) (emphasis added). In
21 *Wanjala*, for example, Judge Acosta noted that the insured was
22 pursuing, through a Form 95 submitted to the USPS, a separate claim
23 for personal injury, lost wages, and pain and suffering.⁶ *Wanjala*,

25 ⁶ "A Standard Form 95 is the form used to submit a claim
26 against a federal agency under the Federal Tort Claims Act for
27 personal property damage or loss, personal injury, or wrongful
28 death caused by the negligent acts of a federal government
employee." *St. Bernard Parish Gov't v. United States*, 99 Fed. Cl.
765, 768 n.5 (Fed. Cl. 2011)

1 2011 WL 4498826, at *5. As such, the insurer "ha[d] the option of
2 attaching a lien to any recovery on that claim under [ORS]
3 742.536." *Id.*

4 In short, the Court agrees with the Government that the Court
5 is without jurisdiction. Accordingly, the Government's motion to
6 dismiss should be granted.

7 **C. Leave to Amend**

8 During the hearing held on the pending motion, USAA's counsel
9 sought leave to amend the complaint in order to substitute USAA as
10 the named plaintiff in place of the Pelhams, and the Court allowed
11 USAA's counsel to submit a supplemental brief on the matter. In
12 his supplemental brief, USAA's counsel argues that the Court should
13 allow USAA to bring a claim, in its own name, under ORS 742.538 to
14 recover PIP benefits from the Government. USAA's counsel
15 emphasizes that "[w]hile it is true that there is nothing in ORS
16 742.538 that explicitly authorizes an insurance company to bring an
17 action in its own name, there is likewise nothing that precludes
18 that." (Pls.' Supp. Resp. at 3.) USAA's counsel goes on to note
19 that a contrary holding would be akin to permitting "a wrongdoer
20 and an insured to perpetrate the equivalent of fraud upon an
21 insurer," leaving the insurer without a remedy.⁷ (Pls.' Supp.
22 Resp. at 5.)

23 The Court is not persuaded by USAA's counsel's arguments in
24 light of the Oregon legislature's expressed intent not to allow two
25 actions to be brought on the same claim in contravention of
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27 ⁷ As discussed above, USAA was not left without a remedy;
28 rather, it appears that USAA voluntarily chose not to pursue the
option of attaching a lien to the Pelhams' recovery.

1 established common-law rules against claim splitting. As the
 2 Oregon Court of Appeals explained in *Wynia v. Fick*, 162 Or. App.
 3 365 (1999):

4 Our reading of the text of the relevant statutes and our
 5 analysis of the legislative history lead us to conclude
 6 that the legislature did not intend for ORS 742.538 to
 7 allow two actions to be brought on the same claim in
 8 contravention of established common-law rules against
 9 claim splitting. Although the statutory scheme allows a
 PIP provider a number of means by which to recover
 benefits paid out, the fact that a provider has options
 does not, in itself, subvert established principles of
 law.

10 *Id.* at 373; see also *Wanjala*, 2011 WL 4498826, at *5 ("Substitution
 11 of State Farm as plaintiff would allow two causes of action on the
 12 same claim. [ORS] 742.538 was intended as a means of recovery when
 13 the injured declined to file suit and the insurance provider had no
 14 other means to recoup the PIP payments. State Farm is not in that
 15 position. . . . Substitution would not cure the jurisdictional
 16 defects or allow State Farm to maintain this action under Oregon
 17 law.").

18 The oral motion for leave to amend the complaint should be
 19 denied and this action should be dismissed with prejudice, in
 20 accordance with Judge Simon's decision *Stevens*.

21 IV. CONCLUSION

22 For the reasons stated, the Government's motion (Docket No.
 23 11) to dismiss should be granted and this action should be
 24 dismissed with prejudice.

25 V. SCHEDULING ORDER

26 The Findings and Recommendation will be referred to a district
 27 judge. Objections, if any, are due **July 11, 2014**. If no
 28 objections are filed, then the Findings and Recommendation will go

1 under advisement on that date. If objections are filed, then a
2 response is due **July 28, 2014**. When the response is due or filed,
3 whichever date is earlier, the Findings and Recommendation will go
4 under advisement.

5 Dated this 23rd day of June, 2014.

6 /s/ Dennis J. Hubel

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DENNIS J. HUBEL
8 United States Magistrate Judge
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